

Regulatory Guidance Letter 88-06

SUBJECT: Nationwide Permit Guidance

DATE: June 27, 1988

EXPIRES: December 31, 1990

The purpose of the Corps of Engineers Nationwide Permit program is to authorize activities that cause only minimal individual and cumulative environmental effects with little, if any, delay or paperwork. The NWP's were subject to public comment through the rule making process and appropriate documentation was developed prior to their issuance. Therefore, FOAs should make every effort to minimize overall effort on each action. Too much effort expended on any one action defeats the goal of the program.

Several questions have surfaced regarding specific provisions of the Nationwide Permit Program as promulgated on 13 November 1986. The following guidance is provided to address those questions.

NATIONWIDE PERMITS (33 CFR330.5) Provides authorization for outfall structures and associated intake structures where the outfall has an NPDES permit. Section 405 of the Water Quality Act of 1987 exempts storm water outfalls from the requirement to obtain an NPDES permit until October 1988. This exemption provision of the Water Quality Act of 1987 is considered adequate to satisfy the NPDES permit requirement of this Nationwide Permit for storm water outfalls. Therefore, outfall structures which qualify for this exemption and meet the other terms and conditions of NWP 7 are authorized by this NWP. After October, only those storm water outfalls with discharges receiving an NPDES permit can be authorized under this NWP.

Authorizes the discharge of backfill or bedding for utility lines. This NWP is not restricted to "crossing" situations as is NWP 14. That is, a utility line can be placed through a wetland parallel to upland areas, and is not restricted to situations where streams or other waterways with an ordinary high water mark (OHWM) must be crossed. The control over adverse impacts to the aquatic environment is through the requirement to restore the site to its actual preconstruction bottom contours. This authorization does include the temporary side-casting of material that occurs with normal construction practice provided the best management practices at 330.6 are complied with to the maximum extent practicable. In particular, the disturbance from side casting must be minimized to the extent practicable and all side cast material must be entirely removed or returned to the original trench. The side cast material may be used to construct temporary cofferdams, access roads, etc., but no additional fill, temporary or permanent, is authorized under this NWP. Also, this NWP does NOT authorize the tile drains or other drainage works where the wetland through which the pipeline is being constructed is being drained. The NWP does authorize pipelines conveying drainage collected from other areas.

Authorizes minor road fills that are single and complete projects for crossing non-tidal water-bodies. In order for this NWP to apply, the road must cross a surface water-body with an OHWM; that is, a lake, pond, river, stream or other open water area. The fill material discharged into wetlands adjacent to the water-body is limited to a maximum of 100 linear feet in wetlands on either side of the OHWM on each side of the water-body. In cases where wetlands exist, water-ward of the OHWM, the total encroachment into wetlands, both above and below the OHWM, on either side of the open water channels, is limited to 100 linear feet. Measurements should be made along the centerline of the roadway crossing the water of the U.S. The discharge is further limited by 33 CFR 330.6, best management practices, which require the minimization, to the extent practicable, of disturbance of a water of the U.S., including wetlands, as compatible with sound road construction practices.

Authorizes minor fills in the headwaters of streams and in isolated waters, sometimes involving the pre-discharge notification procedures at 330.7. Judgment must be used in determining "loss or substantial adverse modification" of waters of the U.S. A substantial adverse modification occurs when a discharge eliminates or greatly reduces the principle valuable function(s) of a water of the U.S., including wetlands. Then impacts factored into this determination must be the direct (i.e., area covered by the fill) or closely related indirect (i.e., change in vegetation such as might occur after flooding a portion of forested swamp by construction a dam and thereby killing all of the trees), and must be substantial. Any indirect impact factored into the determination must similarly eliminate or greatly impair the principle valuable functions (e.g., water quality enhancement, fishery nursery area, wildlife habitat, flood storage, etc.) of the water of the U.S. In the example above, a judgment must be made on what are the principle valuable functions provided by the forested swamp in its present state. As an example, assume that the principal function of forested swamp is wildlife habitat. Back-flooding may or may not be a "substantial adverse modification" depending on the extent to which it impacts the overall wetland. While it may be an adverse impact to certain types of wildlife currently inhabiting the impact area, it could increase diversity of habitat and improve the value of wetland overall for wildlife. As another example, a fill could indirectly eliminate the principle valuable function(s) by blocking back-flooding of a wetland that previously provided flood storage or water quality renovation, thereby reducing or eliminating the wetland's value for these functions.

Areas excavated and areas affected by the excavation should not be factored into the acreage as lost or substantially modified, unless the permittee cannot practicably conduct the excavation without the discharge that is subject to the NWP. Furthermore, impacts resulting from increased use by humans of a wetland area as a result of a small fill should not be included. However, such indirect impacts may contribute to the basis for asserting discretionary authority if they involve concerns for the aquatic environment as outline in 40 CFR Part 230. Indirect impacts such as back-flooding and dewatering are more strongly related to the discharge and should be considered if they are likely to result in substantial, long-term damage.

Linear projects by their nature will likely have minimal impacts on several different water-bodies (i.e., tributaries, ponds and isolated waters). Districts should be careful when determining what constitutes a separate water-body. Individual channels in a braided stream or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate water-bodies. For linear projects, the single and complete project requirement for individual NWP's will be applied to a water-body crossing at a single location. That is, each water-body impacted by a roadway will be considered a single and complete crossing at that location. Where a roadway intersects a single water-body, such as a meandering river at SEPARATE but DISTANT locations, each crossing is considered a single and complete crossing. The purpose of the "single and complete project" language is to preclude situations where one project will repeatedly crisscross one water-body when such multiple crossings can be practicably avoided. It was also meant to preclude construction a crossing and adding lanes later. This approach may result in multiple application of the NWP on a lengthy project that crosses several rivers or tributaries to a river, or a single, large river at several distant locations.

Several NWP's authorize certain cubic yardages of material to be discharged or excavated (i.e., 13, 14, 18 and 19). In all such cases, the volume is to be determined by the material that is discharged or excavated below the plane of the OHWM in non-tidal waters, or the high tide line in tidal waters. For example, if an average of 2 cubic yards of material is placed for bank stabilization per running foot, but of that total only 0.8 cubic yards per running foot are below the plane of the high tide line, the project would be authorized by NWP 13 (provided all other conditions are met). Furthermore, the material placed landward of the OHWM, even though it is below the plane of OHWM, is not included in the volume measurement, nor is backfill material placed in areas excavated channel-ward of the OHWM. For example, the area adjacent to the waterway (above the OHWM) may be excavated for placement of base material for a minor road crossing. Such excavations may become flooded and are temporarily below the plane of the OHWM extended. Material placed in such excavations does not count in the volume measurements. In addition, for NWP 13 and 14 the material is limited to the purpose stated (i.e., for the road crossing or bank stabilization).

The OHWM is the physical evidence (shelving, debris lines, etc.) established by normal fluctuations of water level. For rivers and streams, the OHWM is meant to mark the within-channel high flows, not the average annual flood elevation that generally extends beyond the channel. Wetlands often extend beyond the OHWM. However, for the sake of defining the applicability to NWP's 13, 14, 18 and 19, volume measurements are measured below the OHWM and do not include the volume of material placed in wetlands unless these wetlands are located channelward of the OHWM. The NWP's have other limitations that govern the amount of fill placed in wetlands (e.g., either side of the open water channel, and NWP 13 does not allow any placement of fill in wetlands).

Use of Multiple Nationwide Permits in a Single Project: It is entirely appropriate to combine two or more nationwide permits to authorize an activity. For example, a project that includes both a minor road crossing and downstream bank stabilization work could be authorized under NWP's 13 and 14 provided that the conditions of those permits are

met. Likewise, a project that involves a fill resulting in up to one acres of impacts above the headwaters as well as a minor road crossing fill, is authorized under a combination NWP 26 and 5 without the requirement for a pre-discharge notification (PDN). In other words, the acreage limitations of NWP 26 do not include the acreage that may be impacted by other nationwide permit authorizations which may be part of the same project. However, NWP 26 cannot be "stacked" on itself; that is, NWP 26 may not be used more than once on a single project. Acreage limitations should be figured on a per project basis. For example, where fill for an industrial park would substantially impact a cumulative total of more than 1 acre of wetland, even where spread between two or more wetlands, the PDN should be triggered. This does not, however, apply to linear projects.

Combining Nationwide Permits with Individual Permits: It may be appropriate, in some cases, to allow independent parts of a larger project to proceed under the authority of the nationwide permits while evaluation an individual permit application for other portions of the same project. However, portions qualifying for an NWP should be able to function or meet their purpose without the portion requiring an individual permit.

Whether or not the activities qualifying for nationwide permits are authorized to proceed separately or are included in an individual permit application, the decision documentation relating to the individual permit will include a discussion of the rationale for the course of action taken. Also, a discussion on the total impacts of the entire project (i.e., both the portions authorized by individual and nationwide permit) will be included in the individual permit documentation.

Pre-discharge notification procedures (33 CFR 330.7): Signature authority: Signature authority can be delegated from the district or division engineer to any appropriate level within the district or division, respectively.

District engineer and resource agency comments: When the district forwards a PDN to the division under either of the two provisions of 330.7 (c)(1), it will provide a recommendation on which the division can base its decision under 330.7(d). This recommendation can be either before or after receipt of resource agency comments by the district. However, the district should be aware of the concerns the agencies are likely to express to the division engineer and respond to those concerns in its recommendation, especially where the district thinks the activity should be authorized over agency recommendations to the contrary. This entire evaluation process must be completed within the 20-day limit. In coordination with the resource agencies the district engineer should establish a reasonable date by which the resource agencies must submit their comments in order to be considered within the 20 days. If the date is missed by the resource agencies the division engineer need not address those comments pursuant to 330.7(d).

"May be required": 330.7(a)(2) states that an applicant shall not proceed if the district engineer notifies him that an individual permit "may be required." This was not intended to be used by a district to notify the applicant that more than 20 days would be needed for review and may not be used in that fashion.

Information needed: Upon receipt of an application, regulatory staff will, when reviewing the application, determine whether or not the activity may be covered by a general permit, including nationwide permits. If an application has adequate information to be considered as a PDN it will be so considered. When a district engineer determines that information in an application or PDN is insufficient for the PDN process, he may request that information prior to starting the 20-day clock. Such request must be made immediately and only for additional information needed to meet the minimum requirements of 330.7(b). Information provided by the permittee, relating to the extent of waters of the United States to be impacted by the proposal, will be reviewed by the district and may, in some instances, require confirmation through a field inspection. This review must take place within the overall 20-day timeframe for PDN review. When verifying that an activity is authorized under a NWP, the district should notify the permittee that if the information he submits and on which the Corps bases its NWP and jurisdictional determinations is later found to be in error, the authorization may be subject to modification, suspension or revocation.

When a landowner proceeds with a discharge without going through the PDN process (where required), the DE should, in coordination with the appropriate agencies, determine the best way to proceed. Options include: whether to authorize the project under NWP, see discretionary authority and require an after-the-fact permit application, or initiate an enforcement action.

Discretionary authority (330 CFR 330.8). Discretionary authority can only be exerted as a result of concerns for the aquatic environment as expressed in the 404(b)(1) Guidelines. The district engineer is authorized to add conditions to the NWPs on a case-by-case basis when the applicant agrees to the conditions. If no mutual agreement with the applicant can be reached, the division engineer may require conditions on a case-by-case basis. If a categorical or regional restriction to the NWP is needed, it should be accomplished by the division engineer asserting discretionary authority and adding the appropriate conditions through evaluation procedures in 30 CFR 325. Divisions should not restrict a NWP through discretionary authority then develop a regional general permit for the activities formerly covered by the NWP since any protection or allowances afforded by a regional permit can be placed on the NWP through regional conditioning.

State Water Quality Certification (33 CFR 330.9). If a district receives a PDN for NWP 26 in a state which has denied 401 certification for NWP 26, it normally should defer the PDN process pending the state's completion of its 401 action unless the division engineer determines that, even with a 401 certification, the discharge will likely have more than minimal adverse impacts on the environment. In this case, he should complete the PDN and notify the applicant that an individual permit is required even before he receives the 401 certification.

Enforcing compliance with NWPs. With the exception of the division or district engineer's discretionary authority at 33 CFR 330.8, only the Chief of Engineers can modify, suspend, or revoke a NWP. However, the district engineer can use the appropriate procedures of 33 CFR 326 and 33 CFR 325.7 on a case-by-case basis to

ensure compliance with the terms and conditions of a specific authorization issued under a NWP, including those conditions that he or the division engineer may have added. This district engineer should require only those corrective actions needed to bring the discharge into compliance with the terms and conditions.

Cumulative Impacts: This office prepared an environmental assessment for each NWP prior to their re-issuance in 1986. As part of that assessment, we considered the potential cumulative impacts of each NWP. It is, therefore, not necessary for the districts to assess the potential cumulative impacts of each and every action authorized under each NWP. However, in situations where the district engineer believes that application of several nationwide permits to one project or application of one nationwide permit repetitively by several permittees in a defined area would result in more than minimal cumulative impacts on the aquatic environment, as determined under the 404(b)(1) Guidelines, it is appropriate to exert discretionary authority. Moreover, we have asked districts to, from time to time, conduct monitoring studies of the impacts of NPWs in their areas. The district should periodically review a sample of actions occurring under NWP, perhaps through a comparison of their files to state, regional, or municipal files (i.e., wetland regulatory program, planning and zoning, municipal building permits, etc.) or through aerial photo interpretation.

This guidance expires on 31 December 1990 unless sooner revised or rescinded.